No. 89-1782

In The
Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER,
DEPARTMENT OF COMMUNITY AND REGIONAL
AFFAIRS, STATE OF ALASKA

Petitioner,

v.

NATIVE VILLAGE OF NOATAK, et al

Respondents.

BRIEF OF AMICI, THE STATES OF

Alabama	Hawaii	North Dakota
Arizona	Louisiana	Pennsylvania
Colorado	Michigan	South Carolina
Connecticut	Minnesota	Washington
Idaho	Montana	Wisconsin
Florida	Nevada	Wyoming
	New Mexico	

IN SUPPORT OF ALASKA'S PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
(Counsel of Record)
Solicitor General
PAULA S. BICKETT
Asst. Attorney General
STATE OF ARIZONA
1275 W. Washington St.
Phoenix, AZ 85007
Telephone:(602)542-3333

DON SIEGELMAN
Attorney General of Alabama
DUANE WOODARD
Attorney General of Colorado
CLARINE NARDI RIDDLE
Attorney General of Connecticut
ROBERT A. BUTTERWORTH
Attorney General of Florida
WARREN PRICE, III
Attorney General for Hawaii
JIM JONES
Attorney General of Idaho
WILLIAM J. GUSTE, JR
Attorney General of Louisiana
FRANK J. KELLEY
Attorney General of Michigan
HUBERT H. HUMPHREY III
Attorney General of Minnesota
MARC RACICOT
Attorney General of Montana
BRIAN McKAY
Attorney General of Nevada
HAL STRATTON
Attorney General of New Mexico
NICHOLAS SPAETH
Attorney General of North Dakota
ERNEST D. PREATE, JR.
Attorney General of Pennsylvannia
T. TRAVIS MEDLOCK
Attorney General of South Carolina
KENNETH O. EIKENBERRY
Attorney General of Washington
DONALD J. HANAWAY
Attorney General of Wisconsin
JOSEPH B. MEYER
Attorney General of Wyoming

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QUESTIONS PRESENTED

1. In light of the text of Article III which does not provide for suit by Indian tribes and the adoption of the Eleventh Amendment, can Indian tribes sue the states in federal court where there has been no Congressional action abrogating the states' sovereign immunity?

2. Is there a federal question presented when a state statute providing state benefits to unincorporated communities with native village governments is interpreted, by force of the state constitution, to make the state benefits available to all unincorporated communities?*

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*This Amici brief will not address the second question raised in the petition for the writ of certiorari whether an Indian group is a tribe for purposes of 28 U.S.C. § 1362. Amicus curiae, the state of Connecticut, believes that this question raises significant issues of Indian law and urges that certiorari be granted on this question.

INTEREST OF THE STATES AS AMICI CURIAE

In this case, the Court of Appeals for the Ninth Circuit concluded that the states in consenting to the Constitution have consented to being sued by Indian tribes in federal court.[1/] The Amici states now, as at the time of consenting to the Constitution, are vitally interested in maintaining their sovereign immunity from suit in federal courts.

By holding that state sovereign immunity, as manifested by the Eleventh Amendment, is inapplicable to suits by Indian tribes, the decision below subjects each of the states in the Ninth Circuit to suits by Indian tribes from which the states believed they were

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1. Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1165 (9th Cir. 1990).

immune. Moreover, the states in the Eighth Circuit continue to enjoy immunity from the same kind of suits now permitted in the Ninth Circuit because the Court of Appeals for the Eighth Circuit held that the Eleventh Amendment precludes Indian tribes from bringing suit against states in federal court. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974). Thus, the decision below creates a conflict among the circuits and uncertainty as to the status of the states' immunity in those circuits where the question has not been decided.[2/]

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2. The uncertainty in other circuits is illustrated by an ongoing case involving Wisconsin, one of the Amici states. In Lac Courte Oreilles Band, Etc. v. State of Wis., 595 F. Supp. 1077 (W.D. Wis. 1984), the district court held that 28 U.S.C. § 1362 abrogates the eleventh amendment. Id. at 1081. (Cont'd)

Additionally, the Ninth Circuit's analysis, which contradicts the intent, rationale and holdings of this Court's decisions construing the reach of the Eleventh Amendment, may be utilized in analogous cases to allow further encroachment upon the states' sovereign immunity.

(footnote 2 Cont'd) Unquestionably, however, as expressly recognized by the Ninth Circuit's decision here, the now controlling decisions of this Court disapprove the reasoning underlying the Eleventh Amendment abrogation holding in Lac Courte Oreilles, 595 F. Supp 1077. Moreover, the sovereign immunity issue remains for resolution because this Wisconsin case is continuing: the plaintiff Indian bands seek damages for alleged past treaty violations in the yet to be tried Phase III of Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis., No. 74-C-313-C (W.D. Wis. filed Sept. 4, 1974). Hence, a ruling from this Court on whether 28 U.S.C. § 1362 abrogates a state's eleventh amendment sovereign immunity is critical.

The Court of Appeals for the Ninth Circuit also decided that a substantial federal question was presented by the claim that Alaska violated the federal equal protection clause when it changed, by force of its own constitution, its original revenue-sharing program which favored the Indians over other citizens to a program which treated them the same as other citizens. This decision affects each of the States in the Ninth Circuit directly as their entitlement programs must now be carefully monitored to avoid running afoul of the Court of Appeals holding. Moreover, this decision is likely to have a chilling effect in the Ninth Circuit and other circuits as states will hesitate to favor those especially in need with benefits for fear

that any change in the original program may subject them to liability.[3/]

SUMMARY OF ARGUMENT

A. The Court of Appeals decision openly defies this Court's sixty-four year old precedent established in United States v. Minnesota, 270 U.S. 181 (1926), by declaring it mere dictum. Moreover, despite this Court's recent, repeated and clear pronouncements that although

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3. The Amici states believe that although the grant of certiorari on the Eleventh Amendment question would likely result in the opinion below being vacated, the Court of Appeals' opinion that a federal question was presented by the complaint in this case may remain precedent in the Ninth Circuit. See United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990)(citing Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988, vacated as moot, 109 S.Ct. 1736 (1989). Accordingly, certiorari should be granted on that question as well.

Congress can, under its Commerce Clause powers, abrogate a state's sovereign immunity, such abrogation must be found in unmistakable language in the Congressional enactment itself, the Court of Appeals holds that such abrogation was unnecessary since the states have consented to suits by Indian tribes when the Constitution was adopted. Such a breathtaking holding short-circuits the essence of federalism--state's participation in Congressional debates and law-making. Lastly, certiorari should be granted because there is now a clear conflict among the circuits on whether state sovereign immunity bars suits by Indian tribes against a state.

B. Under the principles announced by this Court in Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982),

a state constitutional provision that addresses, in neutral fashion, a race-related matter, and which merely repeals or modifies race-related legislation or policies that were not required by the Federal Constitution does not violate the Federal equal protection clause. The Court of Appeals' opinion holding that Alaska is barred from also distributing, under its constitution's equal protection and public purposes clauses, legislative grants of monies to other unincorporated communities without Native Village governments, flies in the face of the Crawford decision. The Court of Appeals' decision would freeze in place all state benefit programs which favor racial minorities with the attendant undesirable result that states would be deterred from first enacting such programs.

ARGUMENT

I. THIS CASE PRESENTS THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER INDIAN TRIBES MAY SUE THE STATES WITHOUT ANY CONGRESSIONAL ACTION ABROGATING THE STATES' SOVEREIGN IMMUNITY.

A. The Court Of Appeals Disregarded This Court's Opinion in United States v. Minnesota and the Rationale Governing This Court's Decisions Concerning the Eleventh Amendment.

In United States v. Minnesota, 270 U.S. 181 (1926), this Court determined that the federal government was not barred by the Eleventh Amendment from suing Minnesota in federal court on behalf of the Chippewa Indians. The Court's decision and analysis in United States v. Minnesota was premised on its conclusion that the Indian tribe could not bring suit directly against Minnesota.

> The reason the Indians could not bring the suits suggested lies in the general immunity of the state and the United States from suit in the absence of consent.

270 U.S. 181, 195.

The Court of Appeals' characterization of the above-quoted language as dictum is incorrect. That language is "necessary for and integral to"[4/] the Court's expressly stated conclusion that although the Indians were the real parties in interest, the United States had a duty to act on their behalf and that such an action by the United States did not infringe on state sovereign immunity.

Moreover, the Court's language in Minnesota has remained unchallenged and has not been overruled or disapproved for sixty-four years. It has been cited as an authority as recently as 1983. See, Arizona v. California, 460 U.S. 605, 614 (1983). The Court of Appeals cited no intervening decision nor any other

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4/ California v. Federal Energy Regulatory Commission, 58 U.S.L.W. 4591 (U.S. May 22, 1990).

authority to justify the departure from such a long-standing rule. In light of Congress' plenary power to abrogate state sovereign immunity, the effect of stare decisis has special force, "for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 109 S.Ct. 2363, 2370 (1989).

The Court's conclusion in United States v. Minnesota that state sovereign immunity applies to suits against states brought by Indian tribes is consistent with the Court's interpretation of the Eleventh Amendment in Hans v. Louisiana, 134 U.S. 1 (1890); Smith v. Reeves, 178 U.S. 436 (1900); and Monaco v. Mississippi, 292 U.S. 313 (1934).

In Hans v. Louisiana, the Court held

that the Eleventh Amendment barred suit by an individual against his state. The Court acknowledged that the literal language of the Eleventh Amendment did not provide for such immunity but concluded, nonetheless, that it was the intent of the framers of the Constitution and the purpose of the Eleventh Amendment to protect the sovereignty of the state.

> The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens

in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

. . . The suability of a state without consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.
. . . "It may be accepted as a point of departure unquestioned", said Mr. Justice Miller, in Cunningham v. Macon & B.R. Co., 109 U.S. 446, 451, "that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution."

134 U.S. at 15-17 (emphasis added).

The Court extended its broad interpretation of the Eleventh Amendment to also preclude suit by a corporation against a state, in Smith v. Reeves,[5/]

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5. 178 U.S. at 447-48.

quoting the above language from Hans v. Louisiana.

Finally, in Monaco v. Mississippi, the Court determined that the Eleventh Amendment protected the states from suit by a foreign state:

> The "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent. [citations omitted]

292 U.S. at 329.

The Court's recent cases addressing the Eleventh Amendment have not retreated from the principals set forth in Hans, Reeves and Monaco. The Court expressly declined to overrule Hans in Dellmuth v. Muth[6/] and has consistently held that it will recognize abrogation

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6. 109 S.Ct. 2397, 2401 n.2 (1989)

of the States' Eleventh Amendment immunity only where Congress has made its intention "unmistakably clear in the language of the statute." Id. at 2400, quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Pennsylvania v. Union Gas Co., 109 S.Ct. 2272, 2277 (1989); and Hoffman v. Conn. Dept. of Income Maintenance, 109 S.Ct. 2818, 2822 (1989).

Despite the clear directives from this Court and the Ninth Circuit's own explicit finding that "the statute conferring jurisdiction of suits brought by tribes [28 U.S.C. § 1362] does not unmistakably, unequivocally and textually abrogate the state's immunity. . . ", the Court of Appeals concluded there was no sovereign immunity. It did so based upon a wholly unprecedented concept that the states consented to suit by Indians upon

consenting to the Constitution. 896 F.2d at 1162. The Court of Appeals' rationale and holding is contrary to the decisions of this Court. Because the resolution of this question affects all the states as well as the Indian tribes, the Court should grant the petition for writ of certiorari.

B. The Court of Appeals' Finding that the States "Consented" to Being Sued by the Indians by Consenting to the Constitution Is Contrary to the Text and History of the Constitution and the Spirit and Purpose of the Eleventh Amendment as Construed By This Court.

The Court of Appeals starts with the proposition that a proper reading of the Eleventh Amendment is a "reading consistent with the principles of federalism that inform the amendment." 896 F.2d at 1162. The Amici states have no argument with this general principle; however, the Court of Appeals' conception of these

principles of federalism is vastly different from this Court's view of them. The principles of federalism underlying the Eleventh Amendment as set forth in this Court's decisions mandate the conclusion that the Eleventh Amendment applies to Indian tribes.

Simply stated, the Court of Appeals reasoned that because Indian tribes were present in and about the states at the time the Union was formed and because the federal government was given power by the States to maintain peace with the tribes by entering into treaties and also given exclusive power over Indian affairs, even as to Indians within a state, the States consented to federal jurisdiction over Indian affairs. 896 F.2d at 1162-63. The Court of Appeals rationale cannot withstand analysis.

First, when the states consented to the Constitution, the states consented to the federal judicial power under Article III of the Constitution. Plainly, Article III on its face does not provide for the exercise of federal judicial power in a suit by an Indian tribe against a state. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) explains:

> At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. This was well understood by the statesmen who framed the Constitution of the United States and might furnish some reason for omitting to enumerate them among the parties who might sue in the Courts of the Union. (Emphasis added).

The States also consented to the Commerce Clause including Congressional power to regulate Indian commerce. However, neither the Commerce Clause nor

the Indian Commerce Clause creates or governs federal judicial power under Article III. Therefore, consent to Congressional regulation of Indian Commerce cannot be construed to be consent to federal judicial power which may give rise to a lawsuit by an Indian tribe against a state. Both the adoption of the Eleventh Amendment after the Constitution was adopted and this Court's decision in Hans v. Louisiana reinforce the concept that the states cannot be sued without their consent.

Undeniably, Congress, under Article III's federal question jurisdiction, may permit Indian tribes to bring federal question lawsuits in the federal courts. After this Court's decision in Pennsylvania v. Union Gas Co., supra, it is also established that Congress may, under the Commerce Clause, abrogate a state's

sovereign immunity inherent in the Eleventh Amendment. However, the Union Gas Co. decision makes it clear that Congress must affirmatively legislate in the statute itself in order to abrogate state sovereign immunity. Therefore, the Court of Appeal's consent theory directly contradicts Union Gas Co. The consent theory would render Congressional action unnecessary. Moreover, the states' consent to Congressional action under the Commerce Clause means that the states understood from the beginning that they will be heard in the halls of Congress prior to the passage of such laws by Congress.

> But, the principal and basic limit on the federal commerce power is that inherent in all Congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that

> laws that unduly burden the States will not be promulgated.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985). (emphasis added)

The Court of Appeals' consent rationale would short-circuit that political process and render the states' participatory role in Congress, the very heart of federalism, a nullity.

Second, the reasoning of the Court of Appeals that Indian tribes are more like other states and the federal government than like foreign states and individuals is logically nonsensical. The plan of the Union, by which implied and express powers were given to a central government, was by, between, among, for, and on behalf of States. The tribes had no voice in this federal scheme and were quite consciously excluded. The states did not consent to a union of states and tribes nor to governance by the federal

government and the tribes. The absurdity of such a suggestion bears out the fallacy in the Court of Appeals' reasoning.

As the Seventh Circuit Court of Appeals noted:

> The Constitution of the United States apportions sovereign power between the United States and the several states, not among the United States, the several states and the Indian tribes.

Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983).

It requires direct participation in the plan of the union to benefit from the right to sue despite the Eleventh Amendment. In holding that a foreign state is barred by the Eleventh Amendment, the Supreme Court reasoned as follows:

> The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a state, which inheres in the acceptance of the Constitutional plan, runs to the other states who have likewise

> accepted that plan, and to the United States as the sovereign which the Constitution creates.

Monaco v. Mississippi, supra, 292 U.S. at 330. Thus, a foreign state faces the Eleventh Amendment bar despite the surrender by the states to the federal government of the power to deal with foreign states and despite the absence of foreign states from enumeration in the Eleventh Amendment language. The same rationale inescapably applies to Indian tribes.7/

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7. In addition, the Court of Appeals' decision results in an imbalance that is inconsistent with the principles of federalism: tribes can sue states without regard to consent or abrogation, but states cannot sue tribes. A tribe has sovereign immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978). Thus, a state cannot sue a tribe in federal or state courts unless Congress has waived the tribe's sovereign immunity in unequivocal language or the tribe has consented to suit. Id.; Puyallup Tribe v. Dept. of Game of State of Wash., 433 U.S. 165, 172-72 (1977).

C. There Is Conflict Among the Circuits Whether the Eleventh Amendment Applies to Indian Tribes.

The decision below is directly contrary to the decision of the Court of Appeals for the Eighth Circuit in Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974). In that case, the Court of Appeals for the Eighth Circuit held that the Eleventh Amendment precluded an Indian tribe from bringing suit against North Dakota reasoning that "[t]he doctrine of sovereign immunity as embodied in the Eleventh Amendment has been liberally construed to achieve its intended purpose". 505 F.2d at 1138.

Moreover, although the Court of Appeals for the Second Circuit held that

New York was not immune from suit by the Oneida Indian Nation, the rationale for that court's decision was directly opposite to the decision of the Ninth Circuit. Oneida Indian Nation v. State of New York, 691 F.2d 1070, 1079-1080 (2d Cir. 1982). The Second Circuit assumed that the Eleventh Amendment applied to Indian tribes but held that Congress abrogated the states' immunity when it enacted 28 U.S.C. § 1362. As the Court of Appeals for the Ninth Circuit acknowledged, Section 1362 does not meet the requirements of this Court's decisions in Atascadero State Hospital v. Scanlon, 473 U.S. at 238 and Dellmuth v. Muth, 109 S.Ct. at 2400. Thus, although Oneida seems no longer valid, a resolution of this issue would serve also

to clarify the law in the Second Circuit.[8/]

II. THE COURT OF APPEALS' DECISION HOLDING THAT THE TRIBES CLAIM PRESENTED A COGNIZABLE EQUAL PROTECTION CLAIM CREATES A DANGEROUS PRECEDENT.

The Court of Appeals decided that a federal question was presented by the Indians tribes' claim that the expansion of a revenue sharing program, which benefited only unincorporated communities with native village governments, to

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8. Numerous district court decisions have also assumed that the Eleventh Amendment applied to Indian tribes but held that Congress abrogated the immunity when it enacted 28 U.S.C. § 1362. Lac Courte Oreilles Band v. Wisconsin, 595 F. Supp. 1077 (W.D. Wis. 1984); Cayuga Indian Nation of New York v. Cuomo, 565 F.Supp. 1297 (N.D. N.Y. 1983); Charrier v. Bell, 547 F. Supp. 580 (N.D. La. 1982); Confederated Tribes of Colville v. Washington, 446 F.Supp. 1339 (E.D. Wash. 1978), rev'd in part on other grounds, 447 U.S. 134 (1980).

include all unincorporated communities was racially discriminatory and violated the equal protection clause. The Court of Appeals erroneously relied upon Washington v. Seattle School District I, 458 U.S. 757 (1982), which is clearly distinguishable and disregarded Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982).

The plaintiffs alleged that they were authorized to receive their pro rata share of funds appropriated by the Alaska Legislature in a statute which provided "the state shall pay $25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. § 29.89.050. The plaintiffs also alleged that the Commissioner of the Department of Community and Regional Affairs (the "Commissioner") decided to expand the class of eligible recipients to include

entities other than the Native Villages solely because of the racial ancestory of individual members of the villages and that this decision violated the federal equal protection clause with the result that plaintiffs' share was diluted.

The Court of Appeals acknowledged that Alaska had no duty to vote a bonus of $25,000 to each Native Village. Noatak, 896 F.2d at 1165. The Court also acknowledged that the Commissioner's action was based on Alaska's "non-racial" criterion for the distribution of state benefits. Moreover, as the dissent by Judge Kozinski pointed out, Alaska's action was required by its own "equal protection and public purpose" clauses in its Constitution. However, the Court of Appeals determined that to change the original scheme "on the ground that that status had an ethnic origin is itself a

violation of the Constitutional command not to discriminate on the basis of race." Id. To support its conclusion, the Court of Appeals stated:

> Any governmental action based on the racial character of those affected is presumptively invalid. Washington v. Seattle School Dist. No. I, 458 U.S. 457, 485 (1982) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)

896 F.2d at 1165.

Washington v. Seattle School Dist. does not support the Court of Appeals' conclusion. In Seattle School District, the Court held that an initiative which prohibited school boards from busing students for racial reasons, but permitted the school boards to bus students for vitually every other reason, violated equal protection. The Court cautioned that:

> the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been

viewed as embodying a presumptively invalid racial classification . . .

458 U.S. at 483.

The Court found, however, that:

> Initiative 350, however, works something more than the 'mere repeal' of a desegration law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the state, by lodging decision-making authority at a new and remote level of government.

458 U.S. at 483.

The Court continued:

> Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was <u>designed to accord disparate treatment</u> on the basis of racial considerations.

<u>Id.</u> (Emphasis added)

Thus, the <u>Seattle School District</u> decision was based on the Courts finding that the intiative burdened minority interests and that it was intended to do so.

The Court in Seattle School District relied heavily on its earlier decision in Hunter v. Erickson, 393 U.S. 385 (1969). In Hunter v. Erickson, the Court held that a referendum which attempted to overturn antidiscrimination legislation in Akron, Ohio violated the equal protection clause. The Akron City Council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, amended the city charter to provide that ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestory, must be approved by a majority of the [voters] . . ." 393 U.S. at 387. The Court found that the legislation was intended to burden minorities and did so

by making it more difficult to pass antidiscriminatory legislation.

The tribes do not allege that the Commissioners' actions were "designed to accord disparate treatment"; instead they allege that the Commissioner was addressing the racial classification in the original enactment and that their share was diluted as a result. This is no more than a modification of an affirmative action program which was found to be constitutional by the Court in Crawford v. Los Angeles Board of Education. In Crawford, the Court found an amendment to the California Constitution which prohibited state courts from ordering busing unless a federal court would do so to remedy a violation of the federal equal protection clause did not violate the equal

protection clause. The Court reasoned:

> The Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters. (footnote omitted) This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.
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> * * *
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> Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purpose of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities. (footnote omitted) Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects. (footnote omitted) Yet

> these would be the results of requiring a State to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place.

458 U.S. at 538-540.

Like Crawford, the Commissioner's implementation of the Alaska revenue sharing program which made the funds available to all unincorporated communities was based on the Alaska Constitution. There is no claim that the Alaska Constitution has a disparate impact on minorities or even that it violates the equal protection clause. Therefore, the Commissioner's decision to comply with the Alaska Constitution and modify legislation in a neutral fashion to eliminate racial classifications does not form a basis for an equal protection challenge.

CONCLUSION

Amici states respectfully pray that Alaska's petition for a writ of certiorari be granted. Amici states believe that summary reversal may well be appropriate in the two questions presented herein because the Court of Appeals' decision is directly in conflict with governing decisions of this Court.

Respectfully submitted,

Robert K. Corbin
Attorney General

Anthony B. Ching
Solicitor General
(Counsel of Record)

Paula S. Bickett
Asst. Attorney General
STATE OF ARIZONA
1275 West Washington
Phoenix, AZ 85007
Telephone: (602) 542-3333

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